Supreme Court, U.S.
FILED
DEC 24 1997
CLERK

No. 97-854

In The

Supreme Court of the United States

October Term, 1997

MICROSOFT CORPORATION, *et al.*,

Petitioners,

vs.

DONNA VIZCAINO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Microsoft asks the Court to review an *en banc* decision of the Ninth Circuit, in which the court re-affirmed a prior panel decision on a claim involving the Employee Stock Purchase Plan (ESPP) governed by Washington state law. The Washington State Department of Labor and Industries, in its *amicus* brief supporting the panel's decision, said the Ninth Circuit's opinion is "consistent with existing law concerning [the] employer-employee relationship," Wash. State Br., p. 1, and it "merely applies recognized law and is breaking no new ground," *id.*, p. 10.

Microsoft asserts the Ninth Circuit "failed even to acknowledge state decisional law that is directly on point," citing (Pet., pp. i, 13), a 1978 decision by division three of the Washington court of appeals, *Daniel v. Pacific Northwest Tel. Co.*, 580 P.2d 652 (Wash. App. 1978). Microsoft fails to mention that it nowhere cited *Daniel* in its Appellees' Brief in the Ninth Circuit. In any event, *Daniel* has been effectively overruled by the Washington Supreme Court. Moreover, Microsoft itself vigorously opposed certification of any issue to the Washington Supreme Court by the Ninth Circuit.

Accordingly, the questions presented are:

1. Is the Ninth Circuit's failure to apply the reasoning of a 1978 intermediate Washington appellate court decision, *Daniel*, to the facts of this case such a far departure from the accepted and usual course of judicial proceedings as to "call for an exercise of this Court's supervisory power," particularly where Microsoft did not even cite *Daniel* in its Appellees' Brief in the Ninth Circuit?

2. Do the following constitute persuasive evidence that the Washington Supreme Court would not apply to the facts of this case the 1978 holding of division three of the Washington court of appeals in *Daniel* that the "independent contractor" label used in the contract was binding in that case?

- The Washington Supreme Court effectively overruled the *Daniel* decision in 1990 when it held that extrinsic evidence, including evidence of surrounding circumstances and of the parties' subsequent conduct, is always admissible to interpret the meaning of a contract;

- Decisions of division three of the Washington court of appeals are not controlling outside of Eastern Washington;

- *Daniel* was inconsistent with general Washington contract law even when it was originally decided; and

- *Daniel* is factually distinguishable.

3. Does anything in the Ninth Circuit panel or *en banc* decision support Microsoft's contention that the Ninth Circuit completely based its decision on "inapplicable federal statutes"?

4. Does any rule, precedent, or policy support Microsoft's request that this Court accept review for the purpose of certifying state law issues to the Washington Supreme Court, particularly where Microsoft vigorously opposed such certification below, even after the Ninth Circuit's panel decision in favor of the plaintiff Workers?

LIST OF PARTIES

Microsoft's Petition identifies the eight named plaintiffs as Respondents. There are also others in a court-certified class, *see* Pet., p. A39 n. 1, most of whom were not identified prior to summary judgment below. The plaintiffs and members of the class are collectively called "the Workers" herein.

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinions are reported at 97 F.3d 1187 (9th Cir. 1996) and 120 F.3d 1006 (9th Cir. 1997) (*en banc*) and reprinted in the Petitioner's appendix. The portion of the district court order relating to the ESPP is at pp. A76-A77 of the appendix and the portion of the magistrate judge's report and recommendation relating to the ESPP is at pp. A102-A109 of that appendix.

STATUTES AND REGULATIONS

Microsoft's citation to the Constitution, Art. III, § 2, indicates this is a diversity case. It is not. This case was brought in a Washington state court against Microsoft, a company with its principal place of business in Washington. Microsoft removed it under 28 U.S.C. § 1441(b) because the complaint also included federal ERISA claims. The district court asserted jurisdiction over the Washington contract law claims pursuant to 28 U.S.C. § 1367(a).

The decisions by the Ninth Circuit involved application of Internal Revenue Code § 423 and accompanying Treasury Regulations because Microsoft's Employee Stock Purchase Plan (ESPP) explicitly incorporated these two provisions (ER[1] 83):

> [I]t is the intention of the Company to have the Plan qualify as an "employee stock purchase plan" under Section 423 of the Internal Revenue Code of 1954. The provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner consistent with the requirements of that section of the Code.

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1. "ER" refers to the Excerpt of Record in the Ninth Circuit.

The Treasury Regulations under IRC § 423, incorporated into the ESPP by the provision quoted above, were identified and quoted in part by the Ninth Circuit. 97 F.3d at 1197-98 and n.10, 11 and 13 (Pet., pp. A55-A57).

STATEMENT OF THE CASE

Microsoft's discussion of the facts is replete with errors. The company's discussion of the proceedings below is generally the exact opposite of what actually happened. Microsoft particularly emphasizes its argument that the Ninth Circuit "failed to apply governing state contract law," Pet., p. 2, "disregarding state contract law in favor of inapposite reasoning developed in ERISA cases," *id.*, p. 3, and "[r]elying on an ERISA case from the Eleventh Circuit," *id.*, p. 10. In fact, the precise opposite is true — the two Ninth Circuit opinions in favor of the plaintiff Workers, by the Ninth Circuit panel majority and the *en banc* majority (8-3), relied on many Washington state decisions in deciding the ESPP claim under Washington state contract law. Pet., pp. A11, A16-A17, A54, A58-A59, A61. From the magistrate judge to the *en banc* majority, the opinions below were all in favor of the Workers' ESPP claims, with *one* exception — the district court's order — and *only* that district court decision favoring Microsoft relied exclusively on federal cases, cases that were cited by Microsoft. Pet., pp. A76-A77. Thus, Microsoft's strenuous argument against reliance on federal cases in a decision on the ESPP applies, very strongly, to the *only* decision in its favor.

A. Background

Plaintiffs worked at Microsoft starting in 1987. Some are still working for Microsoft, as are other Workers. Pet., pp. A39-A40. Microsoft misclassified the Workers as "independent contractors" and "temporary agency employees," although they

are employees as defined in the common law. The record shows, and Microsoft concedes, that the Workers were not independent contractors, but in fact employees of Microsoft. Pet., pp. A6, A46 and n.4, A50 and n.9.

The Workers were employed full-time in Microsoft's company offices, under the direction and control of Microsoft supervisors. As software testers, production editors, formatters, and proofreaders, their work is within the core of Microsoft's software business. Pet., p. A3.

> Microsoft fully integrated [the Workers] into its workforce: they often worked on teams along with regular employees, sharing the same supervisors, performing identical functions, and working the same core hours. Because Microsoft required that they work on-site, they received admittance card keys, office equipment and supplies from the company.

Id. The Workers were not temporary or short-term, working for Microsoft for several years. Pet., pp. A39-A40.

In 1987, Microsoft became concerned that the Workers could be considered employees by the IRS because of their work situation, making it liable for back employment taxes. Pet., p. A3; CR 69, pp. 4102-04. Microsoft identified over 100 full-time in-house "contractors" working on software products who met the common-law standards applied by the IRS for defining an employee. *Id.* In an attempt to avoid a problem with the IRS, Microsoft tried to superficially strengthen its position by making the Workers sign an "Independent Contractor Copyright Assignment and Nondisclosure Agreement" (ICCA). CR 86 at 4; CR 90 at 4. The ICCA focuses on proprietary information and also states that the Worker is an "independent contractor."

ER 67. Notwithstanding these ICCA forms, the IRS found the Workers were employees and it established their employee status for tax purposes. ER 51-52; 70-76. Microsoft agreed to pay employer taxes and issue retroactive W-2 forms to these employees. CR 70 at 4321, 4290-91.

The company converted some Workers into recognized Microsoft employees. CR 70, pp. 7639 *et seq.* For most Workers, Microsoft continued to treat them as "contractors" while making payroll tax deductions. Microsoft arranged with some "payroll service" agencies to issue checks to the Workers using Microsoft funds, from which the agencies make deductions for taxes. ER 99. The "payroll service" agencies had no connection with the employees except check processing and paperwork. ER 99, 129-30; CR 69, p. 203214. Microsoft retained control over every material element of employment — recruitment, training, wages, work assignments, scheduling, supervision, offices, equipment, etc. ER 128-130, 99-100. Thus, the Workers' situation remained the same, except for the company name on their checks. Pet., p. A42.

Workers who were assigned to "payroll service" agencies had to sign new "independent contractor" forms. ER 54, 59-63. These forms stated that the Worker will "perform services for Microsoft Corporation" and identified the Worker's Microsoft supervisor. ER 61, 63. Even though IRS had just determined these Workers were employees of Microsoft, *not* "contractors," the forms continued to say the Worker "is an independent contractor for Microsoft and nothing in this agreement shall be construed as creating an employer-employee relationship." ER 61. After their reclassification as Microsoft employees for tax purposes, plaintiffs submitted claims for benefits. The claims were rejected by Microsoft, which disregarded the facts about their employment and maintained that the employees were "independent contractors" for benefit purposes, even though they were employees for tax purposes. ER 2, 13-15. This case ensued.

B. Magistrate Judge's Report And Recommendations

Summary judgment motions were referred to a magistrate judge, who recommended that the Workers' motion be granted on the ESPP. By its express terms, the ESPP is open to "any employee" who meets certain service requirements. ER 84. Microsoft admitted the Workers are "employees" within the meaning of the ESPP and that they had sufficient service. The magistrate judge explained his recommendation on the ESPP as follows (Pet., pp. A106-A107):

> Plaintiffs do not contend that [IRC] §423, *per se*, provides them with a private right of enforcement. What they *do* contend is that Microsoft expressly incorporated §423's terms into its ESPP, thereby making an offer to its employees, including its "common law employees," a classification in which they belonged.
>
> * * *
>
> Microsoft concedes that the tax qualification requirements of §423 "permit tax qualification only for plans that extend participation to all common-law employees." (Def. Opp. Pl. Mot. re: ESPP at 19). And Microsoft expressly indicated in *all* versions of its ESPP plan before the Court, that it intended that:
>
> > The provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner consistent with the requirements of that Section [§423] of the Code.
>
> Microsoft does not really contend at this point that Plaintiffs were not "common law employees,"

> as found by the IRS for tax purposes, and such a contention, were it to be made, would fly in the face of all of the material facts concerning Plaintiffs' work at Microsoft, the existence of which Microsoft acknowledges. Since Microsoft expressly created an ESPP intended to comply with §423, and in fact expressly embraced the coverage extended by §423, and since §423 permits a company to exclude common law employees only by reason of factors not applicable to Plaintiffs, Plaintiffs were entitled to participate in the ESPP.

C. District Court Order

The district court did not accept the magistrate judge's recommendation and it dismissed the Workers' ESPP claim. In deciding the ESPP issues and ruling in favor of Microsoft, the district court relied *only* on federal cases, not citing or discussing a single Washington decision. Pet., pp. A76-A77.

D. The Panel Decision

The Ninth Circuit panel noted, citing *Multicare Medical Ctr. v. DSHS*, 790 P.2d 124, 133 (Wash. 1990), that Washington follows the " 'objective manifestation theory of contracts,' which requires us to 'impute an intention corresponding to the reasonable meaning of a person's words and acts.' " The panel found that

> [t]hrough its incorporation of the tax code provision into the plan, Microsoft manifested an objective intent to make all common-law employees, and hence the plaintiffs, eligible for participation.

Pet., p. A55. The panel emphasized the ESPP itself expressly stated this intention, quoting the ESPP (Pet., p. A55):

> It is the intention of the Company to have the Plan qualify as an "employee stock purchase plan" under Section 423 of the Internal Revenue Code of 1954. *The provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner consistent with the requirements of that Section of the Code.*

(Emphasis by the panel.) The panel explained that IRC § 423, incorporated into the ESPP, requires the company to allow participation in the ESPP by all common-law employees who are not within one of the express statutory exceptions (Pet., p. A55):

> The requirements of §423 dictate that "options are to be granted to all employees of any corporation whose employees are granted any of such options by reasons of their employment by such corporation." 26 U.S.C. §423(b)(4). Because the term "employees" in §423 is construed to refer to "common-law employees," the ESPP, when construed in a manner consistent with the requirements of §423, extends participation to all common-law employees not covered by one of the express exceptions set forth in the plan.

The panel rejected Microsoft's argument that its "independent contractor" forms override the express provisions of the ESPP. The panel found that the pertinent Treasury Regulations for IRC § 423 explicitly make such agreements not controlling. Pet., p. A57. It also noted that interpreting the agreements as disqualifying Workers who are in fact not independent contractors, but are in reality common-law employees, would be inconsistent with the terms of the ESPP, would defeat its stated intent to qualify for favorable tax

treatment, and be contrary to the ESPP's expressly stated rule of construction. Pet., pp. A57-A58.

E. The *En Banc* Decision

The Ninth Circuit adopted the panel decision on the ESPP claim by an 8 to 3 majority, in an opinion by Circuit Judge Fernandez.[2] The *en banc* opinion emphasizes that "[i]t is important to recognize that there is no longer any question that the Workers were employees of Microsoft." Pet., p. A6. The Workers' status is not in question because Microsoft "concede[s] that the Workers were common-law employees. That is to say, they were employees of Microsoft." *Id.* With respect to Microsoft's "contractor" forms, the *en banc* opinion noted that these statements in these forms were in fact not true (Pet., p. A7):

> We now know beyond peradventure that most of this was not, in fact, true because the Workers actually were employees rather than independent contractors. What are we to make of that?

The *en banc* majority elected to construe the agreements as though they were the result of a "simple mistake." Pet., p. A9. Accordingly, the *en banc* opinion explained Microsoft's agreements only apprised the Workers of their responsibilities if they were in fact independent contractors, and did not independently operate to deny them benefits to which they would be entitled if they were employees covered by the plans. Pet., p. A10.

The *en banc* majority noted that, under Washington law, the contract forms would be reformed to reflect the Workers' true status, but this would be unnecessary here (Pet., p. A11):

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2. The *en banc* opinion also remanded an ERISA claim. Neither side seeks review of that portion of the Ninth Circuit's decision.

> But Microsoft saved us and the Workers the trouble of applying reformation doctrine when it agreed that the Workers were, in fact, not independent contractors. Thus, the label became meaningless, as did the explication of what would follow from that label — no withholding, no benefits.

The *en banc* opinion explains that Microsoft agreed in oral argument that this "is not a waiver case" (Pet., p. A12) and thus the Workers had not knowingly and intentionally given up participation in the ESPP under Washington law (*id.*).

Having decided that the mistaken statements in Microsoft forms do not foreclose ESPP participation for the Workers, the *en banc* court addressed the ESPP. The *en banc* majority agreed with the magistrate judge and the panel opinion (Pet., p. A16):

> The ESPP was a plan adopted for the purpose of taking advantage of the benefits conferred under 26 U.S.C. §423. It was approved by the board of directors and by the shareholders of Microsoft. Their action was an offer to employees, as that term is defined in §423. As we have already suggested, we doubt that the corporate officers set out to withdraw the offer from some employees, even if they could have done that. The Workers knew about the fact of that offer, even if they were not aware of its precise terms.

The *en banc* majority rejected Microsoft's arguments, citing several Washington Supreme Court cases holding that, under Washington law, the Workers accept the ESPP offer by their work even if they do not know the precise terms of the ESPP. Pet., p. A16. Thus, the *en banc* majority concluded the Workers are entitled to participate in the ESPP under Washington law. Pet., p. A17.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE NINTH CIRCUIT'S FAILURE TO APPLY TO THE FACTS OF THIS CASE THE REASONING OF A 1978 INTERMEDIATE WASHINGTON STATE APPELLATE COURT DECISION WHICH WAS NOT CITED IN MICROSOFT'S APPELLATE BRIEF IS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Respondent Workers respectfully submit that this case fails to satisfy any of the compelling reasons justifying review by this Court. The sole reason offered by Microsoft is that the Ninth Circuit *en banc* "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" under S. Ct. Rule 10(a). Pet., pp. 17-18. The only "far departure" alleged by Microsoft is that the Ninth Circuit *en banc* failed to apply to the facts of this case the reasoning by a 1978 intermediate state appellate court decision and that "the court of appeals' decision casts doubt on the enforceability of similar agreements between companies and independent contractors throughout the country." *Id.*

Microsoft cannot possibly claim that the panel that decided this case "departed from the accepted and usual course of judicial proceedings" by failing to follow *Daniel v. Pacific Northwest Tel. Co.*, 580 P.2d 652, *review denied*, 90 Wn.2d 1025 (1978), because Microsoft never even cited *Daniel* in its Brief of Appellees to the Ninth Circuit, arguing it first on appeal only in its petition for rehearing.

Given the judicial resources already devoted to this issue, it is difficult to credit Microsoft's argument that one magistrate judge at the district court level, two judges at the panel level, and eight judges at the *en banc* rehearing, have all so greatly "departed from the accepted and usual course of judicial proceedings." The reality is that this case involves a large company that has a controversial employment practice, not that the majority of judges in the panel and the *en banc* rehearing have run amok, heedless of Washington state precedents.

Microsoft exaggerates the significance of one federal circuit court's interpretation of one contract drafted by one company under the common law of one of the fifty states. This decision binds no one but Microsoft and the Workers. It is not controlling even in Washington courts. *In re Salvini's Estate*, 397 P.2d 811, 813-14 (Wash. 1964). Granting certiorari on a matter of Washington state common law would not in any way increase the significance of this case involving a sing'e contract of a particular employer.

II.

THIS COURT SHOULD DENY CERTIORARI BECAUSE THERE IS PERSUASIVE EVIDENCE THAT THE WASHINGTON SUPREME COURT WOULD NOT APPLY TO THE FACTS OF THIS CASE THE 1978 HOLDING OF DIVISION THREE OF THE WASHINGTON COURT OF APPEALS STATING THAT THE "INDEPENDENT CONTRACTOR" LABEL USED IN THE CONTRACT IN THAT CASE WAS BINDING ON THOSE PARTIES.

A. Prior Cases Decided By A State Intermediate Appellate Court Are Not Binding On The Federal Courts If There Is Persuasive Evidence That The Highest State Court Would Rule Otherwise.

Microsoft's sole ground for certiorari is that the Ninth Circuit allegedly failed to follow the company's interpretation of a decision by division three of Washington's intermediate court of appeals. In 1980, however, the Court eliminated from Rule 10 conflict with applicable state law as a ground for certiorari. Stern, *et al.*, Supreme Court Practice (7th ed. 1993), p. 183. Lacking support in Rule 10, Microsoft relies on cases decided over 50 years ago when this Court was fleshing out the consequences of the doctrine of *Erie RR v. Tompkins*, 304 U.S. 64 (1938). *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *West v. A.T. & T.*, 311 U.S. 223 (1940), cited in Pet., pp. i, 15-17. *Fidelity Union* and *West* were apparently reviewed by this Court in order to correct the practice then of circuit courts disagreeing freely with decisions of intermediate state courts of appeals, a practice that undermined the *Erie* doctrine.

Neither *Fidelity Union* nor *West* held that a federal circuit court must slavishly duplicate the holding of an intermediate

state appellate court. To the contrary, *West* expressly held that a rule of law announced by an intermediate state appellate court

> [i]s a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

311 U.S. at 237.

This Court later negatively pointed out some of the "persuasive data" that might dissuade a federal court from following an earlier state court decision, describing the lack of such factors in the case before it:

> [T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.

Bernhardt v. Polygraphic Co., 350 U.S. 198, 205 (1956).

The Court has also observed that the nature and jurisdiction of the intermediate state court is also an important factor to consider, explaining why the Court had held in *Fidelity Union* that the federal circuit court should have followed two four-year-old decisions of the New Jersey Court of Chancery:

> It had state-wide jurisdiction. Its standing on the equity side was comparable to that of New Jersey's intermediate appellate courts on the law side. A uniform ruling by the Court of Chancery over a course of years was seldom set aside by the state's highest court.

King v. Order of United Travelers of America, 333 U.S. 153, 159 (1948).

In the 57 years since *Fidelity Union* and its three companion cases, this Court has rarely found it necessary or appropriate to grant certiorari to simply correct an alleged conflict between a federal circuit court decision and that of an intermediate state court of appeals. Applying to this case the factors described above, certiorari is not appropriate here.[3]

B. Decisions Of Division Three Of The Washington Court Of Appeals Are Not Controlling Even In Washington.

The Court considered the geographic jurisdiction of the state court in considering the weight to be afforded the state court's prior decisions in *King*, *supra*. Washington's intermediate court of appeals is divided into three divisions, each having jurisdiction over certain counties. Rev. Code Wash. 2.06.020. The *Daniel* decision was made by Division Three of the court of appeals, with jurisdiction over only Eastern Washington. Washington Rules of Appellate Procedure 4.1(b). Decisions by one division of the court of appeals do not control the decisions of the other two divisions of the court of appeals, and the divisions periodically disagree expressly with one another's decisions.

3. Microsoft also claims (Pet., p. 14) that this Court should grant review here because "the alternative is allowing blatant federal-court nullification of state law," quoting *Leavitt v. Jane L.*, 116 S. Ct. 2068, 2072 (1996). *Leavitt* had nothing to do with applying an intermediate state court decision on a matter of common law to a private contract dispute. Rather, this Court granted certiorari in *Leavitt* based on a declaration of legislative intent in the statute itself and the impact of invalidating part of the statute under federal constitutional principles. The key factor motivating certiorari in *Leavitt* appears to have been "the total invalidation of a state-wide law" when only part of that statute violated the federal Constitution, *id.*, a concern which is conspicuously absent from this case.

E.g., *Leonard v. Pay'n Save Stores*, 880 P.2d 61, 63-64 (Wash. App. 1994). Even panels of the *same* appellate division disagree with one another. *E.g.*, *State v. Turner*, 665 P.2d 923 (Wash. App. 1983) (division one panel disagreed with different panel of the same division).

This case originated in Western Washington, in King County. Had it not been removed by Microsoft from King County Superior Court to the United States District Court for Western Washington, the *Daniel* case could not have controlled this case anyway (even if it were completely on point).

Finally, unlike decisions of the New Jersey Court of Chancery, which this Court characterized as "seldom set aside by the state's highest court," *King, supra*, 333 U.S. at 159, the Washington Supreme Court reverses over half of the decisions of the Washington courts of appeals accepted for discretionary review.[4]

C. The Washington Supreme Court Effectively Overruled The Daniel Decision When It Held In 1990 That Extrinsic Evidence Is Always Admissible To Interpret A Contract.

In deciding the effect of a prior decision of a state intermediate court, a federal court should consider whether there has been "no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of [state court] judges on the question . . ." *Bernhardt, supra*, 350 U.S. at 205. Recent Washington decisions have not just cast a shadow over *Daniel* — they have totally eclipsed it.

Daniel said the plaintiff in that case was bound by the contract recitation that he was an independent contractor and

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4. Wiggins, *What You Should Know Before Seeking Review in the Washington Supreme Court*, 40 Wash. St. Bar News 25 (Feb. 1986).

the plaintiff could not introduce any extrinsic evidence to contradict that factual recitation. 580 P.2d at 653-54. The Washington Supreme Court overruled this premise in 1990, holding that the court can consider all extrinsic evidence and other agreements between the parties, including the "entire circumstances under which the contract was made, as an aid to ascertaining the parties' intent." *Berg v. Hudesman*, 801 P.2d 222, 229 (1990). The Washington Supreme Court held in *Berg* that "subsequent conduct of the parties" and "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish. . . . the meaning of the writing, whether or not integrated . . ." 801 P.2d at 229 (quoting, in part, *Restatement (2d) of Contracts* § 214(c)). The Court expressly overruled prior cases to the contrary:

> We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.

801 P.2d at 230.

The principles in *Berg* were applied to employment contracts in *Swanson v. Liquid Air Corp.*, 826 P.2d 664, 670, 672 (1992). There, the Court held that the nature of an employment contract, and its interpretation, raise questions of fact and, under *Berg*, "extrinsic evidence is admissible as to the entire circumstances" of the employment contract to determine the parties' real intent. *See also Burnside v. Simpson Paper Co.*, 864 P.2d 937, 943-44 (1994). *Daniel's* refusal to allow the plaintiff to raise a question of fact concerning the "independent contractor" designation through submission of extrinsic evidence of the circumstances and the parties' conduct is thus directly contrary to *Berg*.[5]

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5. *Berg's* impact on *Daniel* is shown by *St. Yves v. Mid State Bank*, 757 P.2d 1384 (1988), one of the decisions expressly overruled in *Berg*.

(Cont'd)

Applying *Berg* to the facts of this case, it would have been error to limit the analysis to the ICCA alone. Rather, the ICCA is read together with the ESPP, the ESPP's incorporation of IRC § 423, the circumstances of the Workers' employment at Microsoft, and Microsoft's concession in this case that the Workers are common-law employees. That is exactly what the original Ninth Circuit panel did in its decision, concluding that the Workers are entitled to the benefits of the ESPP. Pet., pp. A54-A61. The eight-judge *en banc* majority similarly read the ICCA together with the ESPP and concluded that the Workers are employees entitled to enjoy the benefits of the ESPP. Pet., pp. A7-A13, A16-A17. To the extent that *Daniel* might have precluded consideration of such extrinsic evidence, *Daniel* was overruled by the Washington Supreme Court in *Berg v. Hudesman*.

D. The Washington Courts Would Not Follow Daniel Because It Is Factually Distinguishable.

Even if *Daniel* were still good law, there is a persuasive reason to conclude that the Washington Supreme Court would not follow *Daniel* because *Daniel* is easily distinguished on its

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(Cont'd)

801 P.2d at 228, 230. In *St. Yves*, an employee claimed he was wrongfully discharged in violation of a personnel manual. *St. Yves* held, reasoning as in *Daniel*, that because the written employment contract unambiguously permitted the discharge, his contract would be enforced exactly as written. The plaintiff in *St. Yves* could not introduce any extrinsic evidence, including the personnel manual, to raise a question of fact concerning his contract rights. *St. Yves*, 757 P.2d at 1386-87. *Berg* cited *St. Yves* as an example of a case mistakenly requiring ambiguity on the face on a written contract before extrinsic evidence will be admitted. *Berg*, 801 P.2d at 228. *Berg* expressly overruled this theory, holding evidence is always admissible without any showing of ambiguity in the contract. 801 P.2d at 230. *Daniel* was effectively overruled by *Berg* for the same reason *St. Yves* was expressly overruled.

facts. In *Daniel*, a dispute actually existed whether the plaintiff was an independent contractor or an employee. 580 P.2d at 653-54. In this case, there is no factual dispute, as the Ninth Circuit noted in its *en banc* decision (Pet., p. A6):

> [B]oth Microsoft and the SPP have conceded for purposes of this appeal that the Workers were common law employees. In fact, they have asserted that the Workers' status is a "nonissue" because they concede that the Workers were common law employees. That is to say, they were employees of Microsoft.

In *Daniel*, the telephone company had no power to control the manner in which Daniel performed his work, it had no power to assign anyone to assist in the work, and it had no power to hire or fire anyone participating in the work. 580 P.2d at 653-54. Daniel hired his own employees, insured his own employees, and controlled his own employees. *Id.* By contrast, in this case the Workers are integrated into Microsoft's workforce, are supervised by Microsoft personnel, may not assign their work to others, and are required to work on-site at Microsoft. Pet., p. A40. *Daniel* itself recognized that such a contract would not be binding where it is the product of "overreaching" by an employer. 580 P.2d at 654.

In short, the contract in *Daniel* mirrored reality; Daniel appeared for all intents and purposes truly to be an independent contractor.

E. *Daniel* Was Inconsistent With Washington Law Even When It Was Originally Decided.

Additional persuasive evidence establishes that the Washington Supreme Court would not follow *Daniel*. *Daniel* is

thoroughly inconsistent with other Washington decisions on the common law of agency and on the effect of contractual recitations of a worker's status as an employee or independent contractor.

Washington follows the general common law of agency. *Hollingberry v. Dunn*, 411 P.2d 431, 435-36 (Wash. 1966); *Rho Co. v. Dept. of Rev.*, 782 P.2d 986, 990-91 (Wash. 1989); *Ebling v. Gove's Cove*, 663 P.2d 132, 134 (Wash. App. 1983). *Daniel's* holding that the plaintiff could not submit extrinsic evidence to disprove his characterization as an "independent contractor" is contrary to the common law of agency, under which the parties' belief that they either are, or are not, creating an employee relationship is only one factor and is not conclusive. *See Hollingberry v. Dunn, supra*, 411 P.2d at 435-36, adopting *Restatement (2d) of Agency* § 220(2)(g), under which the intention of the parties is a factor, but is not dispositive. Whether the worker is actually an employee or an independent contractor depends on whether the worker is subject to the employer's right of control. *Hollingberry*, 411 P.2d at 435-36. Recent Washington Supreme Court cases affirm that Washington follows the general common law in determining "employee" status. *Marquis v. Spokane*, 922 P.2d 43, 50 (Wash. 1996); *DeWater v. State*, 921 P.2d 1059, 1064-65 (Wash. 1996).

In *Rho v. Dep't of Revenue*, 782 P.2d 986, 991 (1989), the Washington Supreme Court explained that the language in a party's contract is not controlling in establishing an agency relationship (*id.*):

> Determination of an agency relationship is not controlled by the manner in which the parties contractually describe their relationship.

* * *

> In this regard, agency is a legal concept that depends on the manifest conduct of the parties; it "does not depend upon the intent of the parties to create it, nor their belief that they have done so. . . . [A]n agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow." Restatement (Second) of Agency §1, comment b (1958), . . . It follows that an agency can be implied, if the facts so warrant, not only if the contracts are silent as to agency, but even if the parties execute contracts expressly disavowing the creation of an agency relationship.

(Citation omitted).

Under the Washington common law of agency, therefore, it is the facts concerning employment that determine employee status, not the words of the contract alone. *Daniel's* statement that the plaintiff could not introduce extrinsic evidence to show that his relationship was not that of an independent contractor, but instead that of an employee, is erroneous under the common law of agency. Thus, under Washington law, Microsoft's forms cannot control if Workers were in fact employees. Microsoft conceded that the Workers were actually its employees (Pet., p. A6), and, thus, the form's boilerplate language to the contrary is immaterial. *Rho, supra,* 782 P.2d at 991; *Restatement (2d) of Agency* § 220(2), discussed in *Hollingberry, supra,* 411 P.2d at 435-36.

Also, under Washington law a contract may be reformed to correct a mutual mistake of either fact or law, as the Ninth Circuit's *en banc* opinion noted, citing *Wilson v. Westinghouse Elec. Corp.*, 530 P.2d 298, 301-02 (1975); *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 859 P.2d 619, 629-30 (1993), and *Scott v. Pettett,* 816 P.2d 1229, 1234-35 (1991). Pet., p. A11.

Accordingly, because the contract would be reformed under Washington law to correct the parties' mutual mistake in describing the employment relationship, *Daniel's* logic could not apply here. The *en banc* opinion said that reformation is unnecessary here only because

> Microsoft saved us and the Workers the trouble of applying the reformation doctrine when it agreed that the Workers were, in fact, not independent contractors. Thus, the label became meaningless, as did the explication of what would follow from the label — no withholding, no benefits.

Pet., p. A11.

Under Washington law, moreover, a statute affecting "construction" of a contract "is incorporated into" and "becomes a part" of the contract. *Dopps v. Alderman,* 121 P.2d 388, 391 (Wash. 1942); *Boggs v. Whitaker,* 784 P.2d 1273, 1274-75 (Wash. App. 1990). Thus, even if the ESPP did not expressly incorporate the eligibility requirements of IRC § 423 and even if the ESPP did not expressly state that "[t]he provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner consistent with the requirements of that Section [423] of the Code," Washington law would nonetheless construe the ESPP in that way. Under the pertinent Treasury Regulations for IRC § 423, any agreement that incorrectly states that the Worker is an independent contractor is "immaterial" and of "no consequence." Treasury Reg. § 31.3401(c)-1(e); Rev. Rul. 87-41, 1987-1 Cum. Bul. 296, 298.[6] Thus, the Ninth Circuit held that the regulation would render Microsoft's "contractor" forms

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6. The Court cited this IRS Revenue Ruling as a source for the general common law of agency when adopting the common-law definition of "employee" for purposes of ERISA in *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 324 (1992).

inoperative with respect to participation in the ESPP because Microsoft agreed that the Workers are in fact employees. Pet., p. A57.

Moreover, interpreting the ICCAs as precluding the Workers' participation in the ESPP would cause the plan to lose its tax-qualified status, a status which it is the ESPP's intent to achieve. The Washington Supreme Court recognizes the importance of tax-qualified status of a plan and it said that a plan's tax qualification tends to show the plan is an enforceable unilateral contract, not a discretionary gratuity. *Jacoby v. Grays Harbor Chair & Mfg.*, 468 P.2d 666, 669 (1970). Thus, under Washington law the ESPP is enforceable and the ICCAs do not exclude the Workers from participation in the ESPP where they are in fact employees, as Microsoft concedes they are.

When *Daniel* was decided, it was also well established that a party to a contract "is not bound by a false recital of fact, and parol evidence is admissible to show the true state of affairs." *Cook v. Vennigerholz*, 269 P.2d 824, 827 (1954); *Fed. Finance Co. v. Humiston*, 404 P.2d 465, 467-68 (1965) (written contract recited delivery of consideration which had not been provided); *Black v. Evergreen Land Devel.*, 450 P.2d 470, 476 (1969) (written contract said there were no oral agreements, while evidence showed the parties intended one). Thus, when decided, *Daniel* was mistaken in refusing to permit use of extrinsic evidence to show a written contract is factually wrong (*i.e.*, that he was not an "independent contractor" outside the employer's control, 580 P.2d at 653-54).

In short, *Daniel* was wrongly decided in 1978, is no longer good law after the Washington Supreme Court's *Berg* decision in 1990, is factually distinguishable, and would not control this case even if the case had remained in state court in King County. As the Washington State Department of Labor and Industries

stated, the Ninth Circuit decision is "consistent with existing law" and "merely applies recognized law." Wash. State *Amicus* Br., pp. 1, 10. Microsoft's request that this Court grant certiorari to decide the current vitality of *Daniel,* Pet. p. 18, is thus insupportable.

III.

NEITHER THE PANEL DECISION, NOR THE *EN BANC* NINTH CIRCUIT DECISION, IS BASED ON "INAPPLICABLE FEDERAL STATUTES," AS MICROSOFT CLAIMS.

Microsoft incorrectly alleges in its "questions presented" that the Ninth Circuit erred "by following decisional law under inapplicable federal statutes . . ." Pet., p. i. Microsoft explains that it bases this allegation on the fact that the panel majority, having engaged in a detailed common law contract analysis, also mentioned (in a footnote) that "[a] similar approach obtains with respect to plans that require compliance with the provisions of ERISA." Pet., pp. 8-9, referring to the panel decision at p. A56. Footnotes aside, the panel majority decision is based entirely on Washington state cases, the ESPP's explicit incorporation of IRC § 423, and other states' decisions.[7] Pet., pp. A54-A61.

Microsoft greatly misstates the *en banc* decision when it accuses the majority of "[r]elying on an ERISA case from the Eleventh Circuit . . ." Pet., p. 10. The *en banc* majority held that the "independent contractor" label "was a mere error," citing Washington cases that would support reformation of the ICCA to correct this mistake, but concluding that "Microsoft saved us

7. The panel majority discussed Microsoft's reliance on a Ninth Circuit case, but that case also applied Washington law, not federal law. Pet., pp. A58-A59.

and the Workers the trouble of applying the reformation doctrine when it agreed that the Workers were, in fact, non independent contractors." Pet., p. A11. The *en banc* majority then noted "[a] similar case from the Eleventh Circuit lends support to our conclusion." Pet., p. A11. Citing an ERISA case for additional support after analyzing Washington law does not constitute "following decisional law under inapplicable federal statutes and disregarding state decisional law." Pet., p. i. In any event, this section of the *en banc* opinion (p. A11) explicitly dealt with certain matters that affected claims under *both* federal law (ERISA) and Washington contract law. Pet., pp. A5-A6.

If any doubt remains whether the *en banc* majority applied Washington law, rather than federal law, to the ESPP, that doubt is quickly dispelled by reading the two pages of the *en banc* opinion deciding the ESPP issues. The majority cites only Washington cases, not a single federal case. Pet., pp. A16-A17. In sharp contrast, when the district court accepted *Microsoft's position,* it cited *only federal* cases. Pet., p. A76.

IV.

NO RULE, PRECEDENT, OR POLICY SUPPORTS MICROSOFT'S REMARKABLE PROPOSAL THAT THIS COURT SHOULD GRANT CERTIORARI ONLY TO CERTIFY STATE LAW ISSUES TO THE WASHINGTON SUPREME COURT.

The Court should reject Microsoft's remarkable proposal that this Court should grant certiorari only to vacate the Ninth Circuit's *en banc* decision and remand to certify to the Washington Supreme Court an incomplete and biased question of state law. Microsoft's proposal is all the more cynical because Microsoft vigorously resisted certification while the case was

pending in the Ninth Circuit.[8] Pet., p. 10 n.4. Microsoft's position was that the Ninth Circuit should not certify any issue to the state court unless there was some prospect that Microsoft might lose. *Id.* It is not this Court's responsibility to rescue a litigant from the consequences of its tactical decision.

Microsoft's plea for summary vacation of the Ninth Circuit's *en banc* decision gains no support from *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), cited in the Pet., p. 19. There, the Court remanded to reconsider the possibility of certification, but, as the concurring opinion noted, certification entails both delay and expense and rests within "the considerable discretion of the federal court in going about the decisionmaking process . . ." 416 U.S. at 394-95 (Rehnquist, J., concurring). Moreover, *Lehman Brothers* differs critcally from this case in a key respect — there the party asking this Court to certify to the state court had previously, but unsuccessfully, sought certification in the circuit court, 416 U.S. at 392-93 (Rehnquist, J., concurring), while here the opposite is true.

Nor does Microsoft's position find support in this Court's other cases discussing certification. Pet., p. 19 n.9. Each of those cases challenged the constitutionality of a state statute and this Court held that it would have been preferable if the circuit courts certified the construction of the state statute to the state's highest court to obtain an authoritative construction of the statute, possibly avoiding an unneccessary federal constitutional analysis.

When the Workers suggested the possibility of certification to the Washington Supreme Court if the issues of Washington

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8. The Workers said the Ninth Circuit should certify a question to the Washington Supreme Court if the matter were "unclear" (Appellants' Motion, p. 9) and Microsoft strongly opposed any certification. The Ninth Circuit thus decided the Washington common law issues.

law were "unclear" — after the Ninth Circuit panel decision and prior to the *en banc* decision — Microsoft argued it was too late then to request certification (Opposition, pp. 7-8):

> [C]ertification in late stages of litigation is disfavored for the obvious reason that parties should not be allowed a "second chance at victory" after an adverse decision. *In re McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) ("particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below"); *see Perkins v. Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987) (allowing a request for certification in the late stages of litigation may convert the federal court decision into "nothing but a gamble with certification sought only after an adverse decision").

Only now, because the *en banc* Ninth Circuit rejected Microsoft's position again, has Microsoft changed its mind. Its request for certification should be rejected.

Finally, Microsoft argues that this Court should accept review and certify the case to the Washington Supreme Court because the issues in this case are likely to recur frequently, quoting newspaper articles saying the decision could impact employers "across the country." Pet., p. 20. As noted above, the Ninth Circuit's decision does not control even future cases in Washington State, let alone the remaining 49 states. Because such cases are not governed by federal law, it is the responsibility of the state courts to resolve future employer/worker disputes arising under the common law of contracts of the several states.

CONCLUSION

For the reasons stated above, the Court should deny the petition. In the words of the Washington State Department of Labor and Industries, *amicus* below, the Ninth Circuit decision is "consistent with existing law concerning [the] employer-employee relationship," and "merely applies recognized law and is breaking no new ground." Wash. St. Br., pp. 1, 10.

Respectfully submitted,

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